IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	**Case No. 16-cv-03885**
v.	)	**Hon. Sara L. Ellis**
DANIEL C. USTIAN,	)	
Defendant.	)	

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION TO DEEM CERTAIN ALLEGATIONS OF THE COMPLAINT AS ADMITTED BY DEFENDANT DANIEL C. USTIAN, OR, IN THE ALTERNATIVE, TO STRIKE USTIAN'S ANSWER TO THESE ALLEGATIONS

Plaintiff, United States Securities and Exchange Commission ("SEC"), pursuant to Federal Rules of Civil Procedure 8(b)(6) and 12(f), respectfully files this motion to deem the allegations in paragraphs 31, 55, 70, 102, 124-25, 127, 167, and 169 of the SEC's Amended Complaint (Docket No. 67) to be admitted by Daniel C. Ustian ("Ustian") based on his failure to properly answer these allegations in the form of an admission, denial, or a statement of lack of knowledge or information sufficient to form a belief about the truth of these allegations. Alternatively, the SEC moves to strike Ustian's answers to these allegations. In support of its motion, the SEC states:

1. Ustian is the former CEO of Navistar International Corporation ("Navistar").

2. In this case, "[t]he SEC alleges that Ustian and Navistar concealed Navistar's struggle to develop a market competitive engine with statements and omissions that misled the public, violating a plethora of securities laws." 1/24/17 Opinion and Order at pp. 20-21, Docket No. 63.

3. After the Court issued its Opinion and Order granting in part and denying in part Ustian's motion to dismiss, *see* Docket No. 63, Ustian filed an Answer to the Amended Complaint on March 3, 2017 (the "Original Answer"). In Ustian's Original Answer, he responded to, among other things, the SEC's allegations that he made various statements and omissions to the investing public, which are basic allegations at the core of this case. Ustian's Original Answer responded to these allegations by stating that the allegations "purport[] to quote statements . . . which were purportedly captured in a transcript which speaks for itself and as to which no response is required." *See*, *e.g.*, Docket No. 76 at pp. 48-49 (answer to paragraph 125), p. 64 (answer to paragraph 167). The SEC is attaching excerpts of Ustian's Original Answer as Exhibit A hereto.

4. After reviewing the Original Answer, on March 15, 2017, the SEC's lawyers emailed Ustian's lawyers, advised Ustian's lawyers that these responses stating that a document "speaks for itself" were deficient, and asked Ustian to amend his answer. *See* Ex. B attached hereto, March 2017-April 2017 email string between the SEC's lawyers and Ustian's lawyers. Ustian agreed to do so, and, on March 24, 2017, he filed an Amended Answer. *See* Docket No. 80.

5. However, Ustian's Amended Answer has failed to cure many of the deficiencies in the Original Answer. In particular, in response to the SEC's allegations that Ustian made various statements, Ustian continues to refuse to properly answer the allegations. In his

Amended Answer, Ustian has removed references to a document "speaking for itself," and instead he has responded to these allegations by admitting that a "purported transcript" states that Ustian made the statement, vaguely adding: "To the extent any other response is required or that there are remaining allegations" in these paragraphs, Ustian denies the allegations. *See, e.g.*, Docket No. 80 at pp. 32-33 (answer to paragraph 70), p. 55 (answer to paragraph 125), pp. 75-76 (answer to paragraph 167). The SEC is attaching excerpts of Ustian's Amended Answer as Exhibit C hereto.

6. On April 6, 2017, the SEC's lawyers emailed Ustian's lawyers and advised them that Ustian's Amended Answer remained deficient because his responses did not address the SEC's allegations that Ustian made certain statements. *See* Ex. B. On April 10, 2017, Ustian's lawyers replied that "Mr. Ustian's responses fairly respond to the substance of the allegations. Mr. Ustian's responses quote the transcripts upon which the SEC relied in preparing the allegations and admit that the relevant transcripts contain the language referenced in the SEC's Complaint." *Id.* Ustian refused to amend his answer. *Id.*

7. "The purpose of admitting or denying allegations in a complaint is to put the parties on notice of the issues in dispute." *See Jornigan v. New Mexico Mut. Cas. Co.*, 228 F.R.D. 661, 663 (D. New Mexico 2004) (citing 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1261, at 382 (2d ed. 1990)). A party must admit or deny "the allegations asserted against it by an opposing party," and a denial must "fairly respond to the substance of the allegation." Fed. R. Civ. P. 8(b)(1)(B) and 8(b)(2). Moreover, "[a] party pleading lack of knowledge and information is also bounded by the obligation of honesty in pleading," and an allegation that is "obviously within the responding party's knowledge or

information cannot be avoided." *See Wachovia Bank v. Chaparral Contracting, Inc.*, 2010 WL 2803016 at *2 (D. Nev. July 12, 2010).

8. Ustian's responses in his Amended Answer to paragraphs 31, 55, 70, 102, 124-25, 127, 167, and 169 of the SEC's Amended Complaint violate the pleading rules. These paragraphs of the SEC's Amended Complaint allege that Ustian made certain statements. The pleading rules require Ustian to admit or deny that he made the statements. Obviously, Ustian has the knowledge or information to admit or deny whether he made the statements. Not only does Ustian have transcripts of the statements, but in many cases, Ustian also has audiotapes of the statements. Navistar produced these audiotapes to the SEC during the SEC's pre-lawsuit investigation, and the SEC has produced them to Ustian.[1] For example, Ustian has an audiotape of the statements he made during a March 9, 2011 Navistar earnings call, which are the focus of the SEC's allegations in paragraph 70 of the Amended Complaint. The SEC is providing the Court with a copy of this audiotape (which Navistar Bates labeled as NAV00157074) as Exhibit D.[2] Ustian easily can use the transcripts, and, in some cases, audiotapes of the statements he made to form a belief about whether he made the statements and admit that he made them.[3]

9. But instead of responding to the basic allegations in these paragraphs that Ustian made certain statements, Ustian tries to avoid them, admitting that "purported transcripts" state that he made the statements. This "admission" is as useless as it is unresponsive. The SEC's

[1] The SEC notes that the law firms of Latham & Watkins and Law Offices of Laurence H. Levine have represented both Ustian and Navistar in this lawsuit and in the SEC's pre-lawsuit investigation. Thus, Ustian has long had access to these audiotapes.

[2] The Court can locate the statements that the SEC alleges Ustian made in paragraph 70 at 21:22-22:30 of this audiotape.

[3] Rule 8(b) does not require a defendant to have certainty about the truth of the allegations to admit or deny them. Rather, a defendant can admit or deny allegations if he has knowledge or information to form a *belief* about the truth of the allegations. *See Vulcan Materials Co. v. Casualty Ins. Co.*, 1988 WL 130054 at *1 (N.D. Ill. Nov. 30, 1988).

Amended Complaint makes no allegations about transcripts. The SEC alleges that Ustian made statements. Based on these allegations in the Amended Complaint, SEC is entitled to find out, at the pleadings stage, in Ustian's answer, whether he disputes that he made these statements, or any portion thereof.

10. The Court should put an end to Ustian's games. Where, as here, a defendant purposefully evades the plaintiff's basic allegations in an answer to a complaint, courts have either deemed the allegations admitted by the defendant or stricken the evasive responses. *See, e.g., Fletcher v. Hoeppner, Wagner & Evans*, 2015 WL 7016414 at *4 (N.D. Ind. Nov. 12, 2015) (striking certain responses and deeming some allegations admitted); *Gross v. Weinstein, Weinburg & Fox, LLC*, 123 F. Supp. 3d 575, 581-82 (D. Del. 2015) (striking responses in answer); *Certain Underwriters at Lloyd's v. SSDD, LLC*, 2013 WL 6801832 at *4-*6 (E.D. Mo. Dec. 23, 2013) (striking "inadequate and evasive" responses, including responses with a "vague concluding denial" nearly identical to Ustian's vague concluding denials in the Amended Answer); *Zion v. Nassan*, 2011 WL 3757319 at *10-*12 (W.D. Pa. Aug. 25, 2011) (striking responses in answer); *Wachovia Bank*, 2010 WL 2803016 at *1-*2 (deeming allegations admitted); *Visco Fin. Servs. v. Siegel*, 2008 WL 4900530 at *7-*8 (N.D. Ill. Nov. 13, 2008) (striking certain responses and deeming certain allegations admitted); *Frank v. Wilbur-Ellis Co. Salaried Employees Ltd. Plan*, 2008 WL 4370095 at *4-*5 (E.D. Cal. Sept. 24, 2008) (striking responses and stating that defendants' "attempt to duck" allegations "will not be tolerated by this Court"); *Bark v. Emsco VIII, Ltd.*, 1994 WL 502786 at *1 (N.D. Ill. Sept. 13, 1994) (striking responses and stating that "we consider the defendant's failure to admit to basic facts which are genuinely undisputed to be counterproductive.")

11. Under the circumstances of this case, the Court should deem the allegations of paragraphs 31, 55, 70, 102, 124-25, 127, 167, and 169 of the Amended Complaint to be admitted by Ustian. Ustian's violations of the pleading rules are egregious. After the SEC brought Ustian's pleading failures to his attention, he made only cosmetic changes to his evasive and uninformative answers, eliminating the phrase "the document speaks for itself" from his lexicon, but otherwise failing to respond directly to the SEC's actual allegations. This process should not be difficult. Ustian should have readily admitted the basic factual allegations in the SEC's Amended Complaint that he made certain statements. In light of his steadfast refusal to do so, the Court should deem that he has admitted them. In the alternative, the Court should strike Ustian's responses to these allegations and require him to re-plead.

WHEREFORE, for the foregoing reasons, the SEC respectfully requests that this Court: (i) grant the SEC's motion; (ii) deem the allegations in paragraphs 31, 55, 70, 102, 124-25, 127, 167, and 169 of the Amended Complaint to be admitted by Ustian, or, in the alternative, strike Ustian's responses to these allegations and require him to re-plead; and (iii) award the SEC such other and further relief as this Court deems just.

Dated: April 13, 2017

Respectfully submitted,

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

/s/ Eric M. Phillips
By: One of Its Attorneys

Eric M. Phillips
Jonathan S. Polish
Amy Flaherty Hartman
Anne Graber Blazek
Timothy Stockwell
United States Securities and Exchange Commission
175 West Jackson Boulevard, 9th Floor
Chicago, Illinois 60604
Telephone: (312) 353-7390

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on April 13, 2017, a copy of the foregoing Plaintiff Securities and Exchange Commission's Motion to Deem Certain Allegations As Admitted, Or, In the Alternative, To Strike Defendant Daniel C. Ustian's Answers to These Allegations was served upon the following counsel by the Court's CM/ECF system:

Stephen C. Neal
Kathleen H. Goodhart
Benjamin Kleine
Aarti Reddy
Cooley LLP
101 California Street, 5th Floor
San Francisco, CA 94111
nealsc@cooley.com
kgoodhart@cooley.com
jgutkin@cooley.com
areddy@cooley.com

Sean M. Berkowitz
Cary R. Perlman
Latham & Watkins LLP
330 North Wabash Ave., Suite 2800
Chicago, IL 60611
sean.berkowitz@lw.com
cary.perlman@lw.com

Laurence H. Levine
Law Offices of Laurence H. Levine
189 East Lake Shore Drive, 16th Floor
Chicago, IL 60611
laurence.levine@lhlevine.com

Attorneys for Defendant Daniel Ustian

/s/ Eric M. Phillips________________
Eric M. Phillips